Case No. 05-cv-329-GKF(SAJ)
State of Oklahoma v. Tyson Foods, Inc., et al,

AFFIDAVIT OF MARCIA E. WILLIAMS

I, Marcia E. Williams, declare, under penalty of perjury, as follows:

SUMMARY OF KEY OPINIONS

1. I have applied my thirty-seven years of environmental experience and my over twenty years of experience with the Resource Conservation and Recovery Act (RCRA) to the facts presented in this matter. As a senior manager at the U.S. Environmental Protection Agency (EPA), I ran the federal RCRA program. Throughout this declaration, I discuss Congressional history, other information available to EPA, and the public policy considerations that EPA evaluated in determining which materials it would regulate as a RCRA waste. Based on my knowledge and experience, I reach the following opinions which are explained and supported in more detail below.

- Opinion 1 - *Application of Poultry Litter within the IRW is a Legitimate Beneficial Use Practice Under RCRA.*
- Opinion 2 - *Because Application of Poultry Litter within the IRW is a Legitimate RCRA Beneficial Use Practice, It is Not A Solid Waste Under RCRA.*
- Opinion 3 - *Because Application of Poultry Litter within the IRW is a Legitimate RCRA Beneficial Use Practice, It is Not a Hazardous Waste Under RCRA.*
- Opinion 4 - *Water Risks from Poultry Litter Beneficial Use, Including Risks to Public Health, Have Been Regulated by EPA Under the CWA. This is an Example of EPA's Efforts to Coordinate Its Programs As Directed By Congress.*
- Opinion 5 - *Oklahoma and Arkansas Regulations Do Not Include Beneficial Use of Poultry Litter As State Solid or Hazardous Wastes. Even If Oklahoma or Arkansas Were to Enact State Solid or Hazardous Waste Definitions That Included Beneficial Use of Poultry Litter, These Expanded Definitions Would Not Modify the Definitions Used in RCRA Section 7002.*

- *Opinion 6 - Because Poultry Litter Applied in the IRW Is Not a RCRA Solid Waste or Hazardous Waste, It Is Not Covered by RCRA's Section 7002 Citizen Suit Provision.*

EXPERIENCE (A copy of my c.v. is included as Tab A)

2. U.S. EPA: I was employed by EPA from its inception in 1970 through February 1988. I received numerous awards throughout my tenure at EPA and was selected for one of three EPA Senior Executive Service Meritorious Executive awards in 1985 for sustained superior accomplishment in management of programs of the U.S. Government and for noteworthy achievement of quality and efficiency in the public service. I was also awarded a Distinguished Career Medal in 1988 when I left the Agency.

3. From mid-1985 until the time I left the Agency, I served as the Director of the Office of Solid Waste (OSW) where I directed the implementation of RCRA including the recently passed 1984 Hazardous and Solid Waste Amendments (HSWA). In my capacity as Director of OSW, I managed OSW's 250 person, $40 million dollar annual budget and oversaw the development of many new rules relating to solid and hazardous waste. My office was also responsible for interpreting existing RCRA rules and we received hundreds of letters a year, many from regional EPA and state implementers, asking for situation-specific RCRA interpretations. Each of these letters was answered individually. While the basic framework for the RCRA regulatory program had been developed in the early 1980s prior to my arrival at OSW, I became familiar not only with the existing regulatory framework but the history that underpinned the existing RCRA regulatory framework. Such knowledge was critical to my ability to properly implement the remaining requirements under the 1976 RCRA statute and the expansive set of new requirements imposed by HSWA.

4. During my tenure as Director, OSW, we developed approximately 40 new proposed and final regulations under RCRA along with the regulatory impact statements and risk-based analyses to support these rules. The development of these rules also required extensive information collection on a wide range of waste-related topics. The following are examples of some of the new regulations developed during my tenure. With regard to solid wastes, we were undertaking surveys of the types and volumes of solid waste generated and the ways in which these wastes were managed. In part, this information was used to develop regulations to upgrade requirements for solid waste landfills that accepted household hazardous waste and conditionally exempt small quantity generator hazardous waste. In part, this information was used to evaluate

appropriate methods for regulating other types of solid waste and solid waste facilities. With regard to hazardous wastes, we were collecting information and developing rules that expanded the universe of wastes that were classified as hazardous waste. We also continued to revise and refine the regulation of hazardous waste recycling. This included spending significant time determining which types of beneficial use, reuse, and reclamation situations were considered "product-like" and exempt from RCRA and which were considered "waste-like" and subject to RCRA's hazardous waste recycling regulations. This information was incorporated into a detailed guidance document that was utilized by regional and state RCRA staff.

5. In addition to developing regulations, we were designing the RCRA corrective action program for solid waste management units, including regulated RCRA units, as well as the companion corrective action enforcement program. This included the development of guidance documents as well as consideration of the many policy issues associated with cleanup of releases of hazardous waste and hazardous waste constituents.

6. Throughout this timeframe, my office provided national leadership and oversight for the permitting program at over 5,000 individual hazardous waste sites including the corrective action portion of the permit program. My office had Permit Assistance Teams that would work with regions and states developing RCRA permits. We also visited EPA regions for the purpose of providing training on the regulatory program, including the permit program, and reviewing their performance in the area of RCRA permitting and enforcement. Throughout this timeframe, we were reviewing state program applications from states that wanted to obtain or expand federal delegation to implement the RCRA program.

7. Immediately prior to my service with OSW, from 1979 until 1985, I served in EPA's Office of Pesticides and Toxic Substances (OPTS), having been selected as a charter member of the federal Senior Executive Service established by President Carter. From 1983 until mid-1985, I was the Deputy Assistant Administrator (DAA) for OPTS where I shared responsibility for EPA's overall implementation of the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) including the TSCA and FIFRA enforcement program. I also oversaw OPTS's participation on EPA's regulatory steering committee and participated directly in Agency-wide review of all significant regulations and policy issues. One of the key cross-Agency areas that I participated in was EPA's continuing development of its risk assessment and risk management framework. I also co-chaired EPA's Research Committee on Chemicals. From January 1981 until accepting the DAA position in

OPTS, I was Deputy Director and then Acting Director of the Office of Toxic Substances (OTS). In these positions I oversaw the day-to-day administration of the chemical review and control programs for both new chemicals and existing chemicals. From May 1979 until January 1981, I served as Director, Special Pesticide Review Division (SPRD). My office was responsible for re-registering currently registered pesticides based on obtaining and reviewing a complete data set of health and environmental information from pesticide registrants. My office also reviewed and took appropriate regulatory action to restrict or cancel pesticides whose use created unreasonable risk.

8. Prior to my service in OPTS, I served in several other EPA offices. From EPA's inception in December 1970 until the fall of 1972, I was a mathematician in EPA's Office of Research and Development where I performed analytical work evaluating the health effects of exposures to various levels and types of air pollutants to support Agency development of national air quality standards. From September 1972 until spring 1978, I held various positions in the Office of Mobile Source Air Pollution Control, assuming a Branch Chief position for the last few years. In that later position, I developed air emission factors for mobile sources of air pollution. During a three-month period in 1976, I also served an Executive Development assignment at the Senate Public Works committee. This occurred during the time that key pieces of environmental legislation were being drafted including the 1976 RCRA statute and the Toxic Substances Control Act. Then, in March 1978 I was selected to develop a new EPA office, holding the title of Chief, Statistical Evaluation Staff, Office of Planning and Evaluation. In that position, I was responsible for reviewing major EPA regulations to evaluate whether the data and analyses relied upon by EPA were adequate to support the Agency's regulatory positions. My office played a critical role in EPA's plan to implement Executive Order 12044, Improving Government Regulations. This experience provided me with detailed involvement in the overall regulatory development process and the importance of the Administrative Procedures Act. My office also provided statistical consulting support to EPA program offices and participated in the early development of EPA's risk assessment and risk management methodologies.

9. During my tenure at EPA, I had considerable direct interaction with Congress. In addition to my special assignment discussed above, my various management positions required me to track legislative developments within Congress as they applied to the existing EPA programs I was involved with and to provide Congressional staff with EPA input on specific legislative issues. In my senior management capacity, I was also responsible for meeting with Congressional aides to inform them of the status of the implementation of Congressional

mandates. These meetings often involved discussions of Congressional intent. EPA carefully evaluated Congressional intent when developing its regulatory program. During the timeframe I directed OSW, there were frequent ongoing meetings with Congressional staff on all aspects of RCRA and HSWA and EPA's progress and approach to implementing these statutes. At the request of Congress, I testified on numerous occasions before House and Senate committees and sub-committees, both during my tenure at EPA and after leaving the Agency.

10. Browning-Ferris Industries: From February 1988 until August 1991, I held the positions of Divisional Vice President – Environmental Policy and Planning for Browning Ferris Industries, Inc. and also served as Vice President of Environmental Compliance for the company's hazardous waste subsidiary. In those positions, I established an environmental regulatory and legislative program for the company. I also addressed numerous issues associated with solid and hazardous waste including waste classification and the permitting of solid and hazardous waste sites. After leaving BFI, I formed my own environmental consulting firm, Williams & Vanino Inc., and continued to perform consulting work for BFI on regulatory issues and policy matters.

11. Consultant: Following my time at BFI, I have been a consultant to both private industry and government agencies on a wide range of environmental matters, with a particular focus on compliance with RCRA, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Clean Water Act (CWA), and the Toxic Substances Control Act (TSCA). These matters have addressed regulatory compliance requirements under EPA and state environmental statutes as well as OSHA health and safety and DOT hazardous materials statutes. Many of these consulting projects have specifically addressed the RCRA definition of solid waste and hazardous waste and the application of RCRA to use, reuse, and reclamation situations.

12. In addition to expert consulting, I have provided expert testimony at deposition and trial. Areas of testimony have included the application of the federal waste and chemical regulations, the federal regulatory development process, risk assessment and risk management frameworks applied to environmental decision-making, standard of care regarding chemical and waste management practices over time, environmental management systems, and consistency with the CERCLA National Contingency Plan. I have testified at deposition and trial with regard to a range of RCRA issues including the definition of solid waste and the definition of hazardous waste. This testimony frequently explains EPA's thinking and intent in developing various

regulations and policy guidance as well as the thought process behind the application of EPA's regulations and guidance to particular fact-based situations.

13. Other relevant experience: During the mid-1990s, I was a member of the Board of Directors of Safety-Kleen Corporation, one of the major U.S. waste recycling companies at the time. Since leaving EPA, I have also served on several National Academy of Sciences subcommittees on waste and chemicals as well as two EPA Science Advisory Board sub-committees on prioritizing risk across all EPA programs. I have served on other EPA and Department of Energy committees that were chartered to address various waste and chemical issues. During the early to mid 1980s, I headed the U.S. delegation in various international meetings and served as U.S. delegation head to the OECD Chemicals Group. After the tragic Bhopal accident in 1985, I was one of a two member EPA group that went to India to design a hazardous chemical and waste statute at the request of the Indian government.

ASSIGNED TASK

14. I have been asked to discuss the history and public policy considerations that EPA evaluated in addressing whether poultry litter is a "solid waste" within the meaning of RCRA. My analysis and opinions regarding poultry litter apply both to RCRA in general and RCRA Section 7002. I also discuss other related statutes, regulations and public policy considerations that EPA evaluated in addressing this issue.

15. I have also been asked to evaluate Oklahoma's and Arkansas's solid and hazardous waste programs. EPA has delegated authority to run most aspects of the RCRA hazardous waste program to both Oklahoma and Arkansas and EPA has also approved both states to implement the RCRA Part 258 solid waste program. While states can be more stringent or broader in scope than the federal regulatory program, they cannot be less stringent or inconsistent with the federal RCRA program. In my experience, states that choose to be more stringent or broader in scope than the federal RCRA program provide clear notice to regulated entities in areas of increased regulatory coverage, either through the adoption of notice and comment rulemaking or through issuance of guidance or policy statements.

16. The documents I have reviewed and considered in forming my opinions are listed in Tab B. The statements and opinions included in this affidavit are based on my knowledge and my 37 years experience in the environmental field including my years

administering the RCRA program at EPA. My experience includes providing training to the regulated community on RCRA both during and after my EPA tenure.

GENERAL BACKGROUND ON THE RCRA STATUTE

17. Purpose and Coverage of the Statute: RCRA is a waste management statute crafted specifically to deal with waste materials that are discarded. For discarded materials, Congress established two important objectives – (1) protection of health and the environment and (2) encouragement of resource conservation.

18. Congress used the concept of "discard" as the underlying basis for RCRA jurisdiction.[1] "*The Resource Conservation and Recovery Act of 1976 is a multifaceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year....*"[2] The House Committee report stated that the words "discarded materials" more accurately reflected its concern than the words "solid waste." In part that is because the Committee was also concerned with liquid and contained gaseous wastes, semi-solid wastes and sludge, not just solid waste. In part, it was because the Committee recognized that not all waste was discarded. "*Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses. An increase in reclamation and reuse practices is a major objective of the Resources Conservation and Recovery Act.*"[3]

19. The House Committee specifically addressed the application of its concept of "discarded material" to agricultural waste by stating: "*Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.*"[4]

20. The Relationship Between RCRA and Other Environmental Laws: Congress emphasized that RCRA was one piece of a larger package of federal environmental legislation. "*The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and*

---

[1] While the final version of RCRA included the terminology "solid waste" instead of the terminology "discarded material," the use of the terminology "solid waste" is discussed in terms of discarded materials.

[2] House of Representatives Report No. 1491, 94th Cong., 2d Session, part I (1976), reprinted in 1976 U.S.C.C.A.N. 6238 (page 6239).

[3] Ibid., page 6240.

[4] Ibid., page 6240.

hazardous wastes. Further, the Committee believes that this legislation is necessary if other environmental laws are to be both cost and environmentally effective. At present the federal government is spending billions of dollars to remove pollutants from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way."[5] RCRA did not replace these other statutes and was intended to work in tandem in a non-duplicating manner. Section 1006 of RCRA specifically discusses the integration of RCRA with other statutes.[6]

21. Congressional Recognition That Not All Surface and Groundwater Contamination Is The Result of Discard Regulated by RCRA: In addition to passage of the CWA, during my tenure at EPA Congress enacted or amended other environmental legislation specifically to address products whose normal use resulted in unreasonable risk, including risk to water.[7] Along with the CWA, these other laws were designed to address risks to water that arose from the agricultural sector including risks from application of fertilizers and soil amendments.[8] By enacting these other pieces of environmental legislation, Congress clearly communicated to EPA that even if a particular activity could result in water or soil contamination, that did not necessarily mean that the activity involved the type of "discard" that Congress intended to regulate under RCRA.

THE RCRA SOLID WASTE REGULATORY FRAMEWORK

[5] Ibid., page 6241-6242.

[6] Ibid., page 6291. Section 106 House Committee language states: "*Subsection (a) provides that nothing in this Act shall be construed to apply to any activity or substance which is subject to the Federal Water Pollution Control Act, the Safe Drinking Water Act or the Atomic Energy Act of 1954 except to the extent that such provision or regulation is not inconsistent with the requirements of such Acts. Subsection (b) provides that the Administrator shall attempt, to the maximum extent practicable, to coordinate the administration and enforcement of this Act with the other environmental laws under the authority of the Administrator.*" (Section 106 became RCRA Section 1006.)

[7] For example, Congress passed the Toxic Substances Control Act (TSCA) to address product use (including fertilizers and soil amendments) that could result in unreasonable risks including risks to water. Congress continued to modify the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) so that it addressed risks from pesticide use including risks to water.

[8] Routine agricultural practices have long been understood to contribute to water pollution from the application of commercial fertilizers and pesticide products as well as the natural erosion process. For example, see Council of Environmental Quality (Executive Office of the President), Twentieth Annual Report, 1990, pages 236-243. Also see EPA Report to Congress: Non-point Source Pollution in the US, January 1984 (page 2-6 to 2-9). Also see EPA, 1996 National Water Quality Inventory Report to Congress, page 15.

22. EPA Development of Solid Waste Planning and Disposal Regulations: Shortly after the passage of RCRA, EPA began working on implementing the RCRA Subtitle D solid waste requirements. In 1977, the Agency issued an advanced notice of proposed rulemaking (ANPRM) addressing criteria for classification of solid waste disposal facilities under RCRA Section 4004. *"Section 4004(a) requires that the Administrator promulgate regulations containing criteria for determining which disposal facilities are to be classified as sanitary landfills and which are to be classified as open dumps within the meaning of the Act... These criteria for classification of solid waste disposal facilities are the keystone of the land protection provisions of the Act."*[9]

23. EPA followed this ANPRM with a notice of proposed rulemaking (NPRM) on the solid waste classification criteria. In this NPRM, EPA stated that facilities which are subject to the criteria and do not meet them are prohibited. Such facilities were intended to be closed or upgraded according to a State-established compliance schedule. With regard to agricultural wastes, EPA stated: *"The criteria as proposed do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners, or to mining and milling wastes intended for return to the mine. Congressional support for this exclusion is found in the House Report on the bill."*[10] The EPA preamble language went on to quote the House Report that I have quoted above.

24. Final EPA Rulemaking on Federal Solid Waste Classification Criteria: EPA finalized these solid waste classification criteria in September 1979, clarifying that these criteria were intended to fulfill the statutory requirements in Section 4004 to distinguish between sanitary landfills and open dumps. In finalizing these regulations, EPA examined public comments suggesting the exclusion or inclusion of specific types of solid waste disposal activities. *"EPA examined these suggestions in light of the Act's definitions, Section 1006 of the Act (which directs the Agency to avoid duplicative regulatory programs), the Act's legislative history and the objectives of Subtitle D."*[11] EPA repeats language from its proposal again emphasizing that: "*The criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners. All other disposal of agricultural wastes, including*

---

[9] 42 Federal Register 31116, 31116-31117 (July 5, 1977). The Agency clarified that these classification criteria applied to all types of facilities that managed RCRA solid wastes.

[10] 43 Federal Register 4942, 4943 (February 6, 1978). Also see page 4952 which included the proposed regulatory definition of solid waste.

[11] 44 Federal Register 53438, 53440 (September 13, 1979).

placement in a landfill or surface impoundment, is subject to these criteria. This exclusion is based on the House Report which explicitly indicates that agricultural wastes returned to the soil are not to be subject to the Act."[12]

25. The criteria covered disposal of solid waste in floodplains, impact of solid waste disposal on endangered and threatened species, impact on surface waters, impact on ground water, application to land used for production of food-chain crops, disease impacts, air impacts, and safety impacts. Facilities that were covered under these regulations and did not satisfy the criteria were to be classified as open dumps under RCRA and EPA stated it would publish a list of open dumps as required under Section 4005(b) of RCRA. *"The inventory of 'open dumps' will serve two major functions. First, it will inform the Congress and the public about the extent of the problem presented by disposal facilities which do not adequately protect public health and the environment. Second, it will provide an agenda for action by identifying a set of problem facilities, routinely used for disposal, which should be addressed by State solid waste management plans in accordance with Section 4003 of the Act."*[13] EPA also noted that the prohibition against open dumps could be enforced in Federal district court through the citizen suit provision in RCRA Section 7002. *"The Act does not give EPA authority to take legal action against parties that may violate the open dumping prohibition. The application of the open dumping criteria to the specific acts of specific individuals is a matter for the Federal courts to determine in the context of specific cases."*[14] However, an "open dump" classification would not have applied to any situation where agricultural waste, including manure, was placed on the land for soil amendment or fertilizer purposes even if that situation posed a threat of water pollution.

26. In support of its final regulation, EPA was required to develop an Environmental Impact Statement (EIS). An EIS considers environmental benefits of the action, alternatives to the selected action, and costs of the action.[15] This 900 page document analyzes the rule requirements in some depth. It clearly states that fertilizer and soil amendment uses of

---

[12] Ibid.

[13] 44 Federal Register 53438 (September 13, 1979).

[14] 44 Federal Register 53438 (September 13, 1979).

[15] EPA (prepared under contract by Emcon Associates), Environmental Impact Statement: Criteria for Classification of Solid Waste Disposal Facilities and Practices, December 1979.

animal manures are not covered within the rule.[16] In addition, it makes no mention of impacts or costs associated with waste disposal of animal manures. The lack of such discussion further supports and documents EPA's belief that at the time this rule was issued, animal manure was determined to be routinely utilized as a fertilizer or soil amendment and therefore exempt from this rule. If such animal manure disposal activities were ongoing and subject to this rule, EPA's EIS would have identified and discussed the economic and environmental impacts of the final solid waste classification rule on this part of the agricultural sector.

27. Plaintiffs suggest that any determination that manures are legitimately used as fertilizers or soil amendments requires a site-specific analysis. Such site-specific analyses are clearly data intensive and time intensive. If EPA had believed that such an analysis was required, it would have included the need for such an analysis and the resulting national costs in its EIS. The lack of such a discussion confirms that EPA did not require such an analysis to take advantage of the regulatory exemption.

28. Other EPA documents also support the conclusion reached by the Agency in the EIS that animal manures are and have been legitimately used for fertilizer or soil amendment purposes. For example, in 1988 EPA issued a Report to Congress summarizing different types of solid waste streams and facilities. While the main focus of the report was municipal and industrial waste, there was some limited information on agricultural waste.[17] At this time, EPA stated that with regard to agricultural land application units covered under RCRA, *"none or few were thought to exist."*[18] EPA also noted that: *"A total of 2.0 billion tons of wet manure are produced each year from livestock on American farms"* but stated the only portion of this waste that was regulated by RCRA was what was not returned to the soil.[19]

29. In a more recent 2000 publication, EPA stated: "*Animal manure has been recognized for centuries as an excellent source of plant nutrients and as a soil 'builder' in terms of its positive benefits to soil quality. Animal manure is an excellent source of nutrients for plants because it contains most of the elements required for plant growth. Livestock operators today*

---

[16] Ibid. including page II-28.

[17] EPA, Report to Congress: Solid Waste Disposal in the U.S., January 1988, Volume 1 (page 11) and October 1988, Volume 2 (pages 3-30 to 3-31).

[18] EPA, Report to Congress: Solid Waste Disposal in the U.S., January 1988, Volume 1 (page 11).

[19] EPA, Report to Congress: Solid Waste Disposal in the U.S., October 1988, Volume 2 (pages 3-30 to 3-31).

are managing and using manure as an important and valuable resource. If managed and used properly, manure can provide benefits for the livestock operation, such as reduced commercial fertilizer use and increased soil quality."[20]

30. Implementation of EPA's Solid Waste Classification Criteria: EPA provided guidelines to states on the development and implementation of state solid waste management plans.[21] These guidelines addressed the minimum requirements for approval of state plans under Section 4003 of RCRA. One of the requirements was that each state plan provide for the closing or upgrading of all existing open dumps and prohibit the establishment of new open dumps.[22] EPA also included in these guidelines a requirement that State planning prevent duplication of administrative and enforcement efforts. *"The State solid waste management plan shall be developed in coordination with Federal, State, and sub-state programs for air quality, water quality, water supply, waste water treatment, pesticides, ocean protection, toxic substances control, noise control, and radiation control."* [23] EPA guidelines also said that State plans shall provide for coordination where practicable with plans of neighboring States.

31. EPA also issued a detailed guidance document on classifying solid waste disposal facilities for the purpose of developing an open dump inventory. In the introduction to this guidance document, EPA listed the types of solid waste disposal facilities covered by the guidance. That list included agricultural operations with the exception of *"facilities where agricultural wastes (e.g., manure and crop residues) are returned to the soil as fertilizers or soil conditioners."*[24] For facilities covered by these guidelines, this guidance document identified detailed evaluation questions for each of the eight individual solid waste classification criteria.[25]

---

[20] EPA, Profile of the Agricultural Livestock Production Industry, September 2000, pages 43-45, and 53-56. This document also states: *"Animal waste management systems involve the collection, transport, storage, treatment, and utilization (rather than disposal) of waste, preferably in a manner that is economically and environmentally sound."* Thus, this recent EPA document again is clear that the existence of environmental releases or impacts does not equate with a determination that a material is not beneficially used.

[21] 40 CFR 256. Also see 44 Federal Register 45066 (July 31, 1979) and 46 Federal Register 47048 (September 23, 1981).

[22] 44 Federal Register 45066, 45068 (July 31, 1979).

[23] 40 CFR 256.50.

[24] Versar, Inc prepared for EPA, Classifying Solid Waste Disposal Facilities, January 1981, Introduction.

[25] Detailed evaluation questions are presented for both ground water and surface water protection topics.

32. Between 1981 and 1985, EPA issued annual versions of the Open Dump Inventory.[26] The initial inventory included approximately 1,200 sites and the 1985 inventory included approximately 2,000 sites. There is no indication that any of the sites listed on the federal open dump inventory were farms used for landspreading of animal manure for a waste disposal purpose. This information, submitted by the states, is consistent with other information that EPA had at the time (discussed above) that animal manure was routinely and legitimately used for soil amendment or fertilizer purposes and therefore exempt from RCRA Subtitle D requirements including evaluation against the solid waste classification criteria.

THE RCRA HAZARDOUS WASTE REGULATORY FRAMEWORK

33. RCRA Complexity: The RCRA hazardous waste regulations are not a simple set of regulations. They have been compared with the tax code in complexity. Not only is RCRA complex, it is often counter-intuitive. Wastes that are chemically similar can be regulated quite differently depending upon who generates them, the source of the material, and the intended management method. Adding to the complexity, certain aspects of RCRA are intent-based. Therefore, RCRA determinations can change if "intent" changes.[27] Although plaintiffs in this case have not alleged that poultry litter is a RCRA hazardous waste, I have included the information in this section to explain the relationship between RCRA's solid waste regulations and its hazardous waste regulations.

34. What Materials Are Hazardous Wastes Under RCRA: Under the RCRA statutory and regulatory framework, hazardous wastes are a subset of solid wastes. Thus, a material cannot be classified as a hazardous waste unless it is also a solid waste under RCRA. For the purpose of determining whether a material can be evaluated as a hazardous waste under RCRA, EPA has included a regulatory discussion of what constitutes a solid waste in 40 CFR 261.2, the section of RCRA that addresses Identification and Listing of Hazardous Waste. EPA included this section to distinguish between use, reuse, or reclamation activities that were considered "product-like," and therefore exempt from RCRA hazardous waste jurisdiction, from those that could include an element of discard and therefore fall within RCRA's Subtitle C

[26] See 46 Federal Register 29064 (May 29, 1981). Also see EPA's Inventory of Open Dumps, May 1983 and EPA's Inventory of Open Dumps, May 1984.

[27] RCRA regulation of hazardous waste recycling is one example of intent-based RCRA regulations. Another example is the definition of what constitutes RCRA hazardous waste treatment.

jurisdiction.[28] Because EPA placed high importance on capturing hazardous waste management within the RCRA system if it could potentially look similar to discard, EPA developed a broader definition of "solid waste" than the RCRA statutory definition solely for evaluating which hazardous waste could fit within RCRA hazardous waste jurisdiction. However, EPA clearly stated that this definition did not replace the definition of "solid waste" under RCRA. *"The definition of solid waste contained in this part applies only to wastes that also are hazardous for purpose of regulations implementing Subtitle C of RCRA. For example, it does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled."*[29] For this reason, section 40 CFR 261.2 would not apply to agricultural wastes that Congress specifically excluded from RCRA's definition of solid waste.

35. Definition of Hazardous Waste: In 1980, EPA finalized its initial set of hazardous waste regulations. These regulations included the framework for determining what solid wastes would be classified as RCRA hazardous wastes. While the RCRA statute included a broad definition of hazardous waste, only those wastes that EPA specifically identified as hazardous waste under its waste identification regulations are regulated under the federal subtitle C hazardous waste generation and management regulations.

36. Hazardous waste exemptions: When EPA initially promulgated its hazardous waste regulations in 1980, it identified various types of waste materials that did not appropriately fit within the hazardous waste regulatory framework. These exemptions were placed into 40 CFR 261.4 of the regulations. Over time, these exemptions have been expanded and refined. However, from the time of its initial regulations, EPA exempted agricultural wastes generated from growing and harvesting crops and from raising animals from hazardous waste regulation when those materials were returned to the soil as fertilizer.[30] EPA's rationale for this exemption again went back to Congressional intent. *"The exclusion was based on the legislative history of RCRA which specifically calls for such an exclusion. See H. Rep. No. 94-1491, 94th Congress, 2nd Session (1976). Commenters generally accepted this exclusion and EPA has decided to retain it*

---

[28] In 40 CFR 261.1, EPA clarifies that it uses the terminology "recycling" to refer to any of the set of activities involving use, reuse, or reclamation. During my tenure with EPA, we also used the terminology recycling in the RCRA Subtitle D context to refer generally to use, reuse, or reclamation activities.

[29] 40 CFR 261.1(b)(1).

[30] 40 CFR 261.4(b)(2).

because the need for such an exclusion is so clearly identified in RCRA's legislative history."[31] This exemption means that even if these materials could otherwise be considered hazardous, a claim that plaintiffs have not made, and therefore evaluated against the broader "solid waste" definition that EPA utilized solely to evaluate which materials were hazardous waste, animal manures still would not be regulated under RCRA Subtitle C if they were used as fertilizer.

37. State Delegation for the RCRA Hazardous Waste Program: The RCRA hazardous waste program was designed to be implemented by authorized states. A state can receive RCRA delegation when it submits a program for EPA approval that is not less stringent than the federal RCRA program and is not inconsistent with the RCRA program. A delegated state program can be more stringent than the federal RCRA program and it can be broader in scope. To the extent that a state program is broader in scope than the RCRA program, those portions of the program that are broader in scope are not part of the delegated RCRA program.[32] The RCRA authorization requirements are addressed in 40 CFR Part 271 regulations and EPA has issued many guidance documents that address these topics.

CONGRESSIONAL RE-EVALUATION OF RCRA IN THE EARLY 1980'S DID NOT CHANGE THE REGULATORY STATUS OF ANIMAL MANURE

38. Beginning in the early 1980s, Congress began evaluating whether changes to the 1976 RCRA statute were appropriate. A RCRA reauthorization bill, Hazardous and Solid Waste Amendments (HSWA), was passed in fall 1984. *"The purpose of the Bill is to authorize appropriations for activities authorized or required in the Solid Waste Disposal Act (commonly known as RCRA) and to make certain amendments and modifications in the Act in order to assure adequate protection of public health and the environment."*[33] In enacting HSWA, Congress identified various gaps in statutory authority and EPA regulation and modified the statute to

---

[31] 45 Federal Register 33084, 33099 (May 19, 1980). Had there been public comment or confusion on what constituted fertilizer or soil conditioner use, EPA would have provided additional explanation. For example, commenters did request more clarity on a companion EPA exemption for mining waste overburden that was also included in the RCRA legislative history. In that case, because there were significant public comments, EPA provided additional clarification. The lack of clarification on the agricultural waste exemption further supports EPA's general view that these materials were routinely used for fertilizer and soil conditioner uses.

[32] See EPA RCRA/Superfund Hotline Monthly Summary, State Programs, September 1986, 9572.1986 (1). See Internal EPA Memorandum from Lee Thomas (Assistant Administrator for OSWER) to Addressees re: "Determining whether a requirement of an authorized State hazardous waste program is broader in scope or more stringent than the Federal RCRA program," May 21, 1984, 9541.1984(04).

[33] House Report No. 98-198, Part 1 (1983), 5576, reprinted in 1984 U.S.C.C.A.N.

ensure these gaps would be closed. The primary focus of this Congressional reauthorization was hazardous waste.

39. During development of HSWA, the House of Representatives examined EPA's regulation of use, reuse, reclamation, and recycling for hazardous waste. The revisions in H.R. 2867, the final House bill, confirmed that EPA had *"the discretion to regulate only particular types of hazardous wastes being used, reused, recycled, or reclaimed, or particular types of use, reuse, recycling and reclamation activities. The Commission [sic] recognizes that complex decisions as to which beneficial use, reuse, recycling, or reclamation activities should be regulated as necessary to protect human health and the environment, require regulatory discretion. In essence, the Committee is directing the Agency to examine the entire range of hazardous waste use, reuse, recycling and reclamation activities in order to choose which should be regulated as necessary to protect human health and the environment."*[34] At this time, the House Committee was clear that any new regulations should only apply to hazardous waste and should not encompass non-hazardous solid waste.[35]

40. There is nothing in HSWA or its legislative history that changes the statutory exclusion from RCRA's solid waste definition that was present in the 1976 RCRA statute for animal manures applied as fertilizers or soil amendments. In addition, the House Committee again clarified that EPA's definition of solid waste contained in its Subtitle C regulations did not apply to wastes that were not also hazardous waste under EPA's hazardous waste identification regulations.

EPA GUIDANCE ON WHAT CONSTITUTES LEGITIMATE USE, REUSE, OR RECLAMATION (I.E., RECYCLING)

41. EPA Hazardous Waste Regulations and Guidance on Recycling: EPA's initial hazardous waste management regulations in 1980 provided limited coverage of storage of

---

[34] Ibid., page 5605.

[35] *"The amendment also contains language designed to indicate unequivocally that EPA's implementing regulations shall apply only to wastes that are identified by means of a hazardous waste characteristic or are listed as hazardous wastes, i.e. to wastes that are hazardous under EPA's Subtitle C regulations. Thus, EPA could not seek to regulate under its hazardous waste management regulations non-hazardous wastes that are being reclaimed. Non-hazardous wastes being recycled in any manner, of course, remain subject to the other portions of the statute and EPA's regulations dealing with non-hazardous wastes, such as the provisions of subtitle D and the open dumping criteria contained in EPA's regulations implementing Section 1008(d)(3) of RCRA (40 CFR Part 257).* House Report No. 98-198, Part 1 (1983), 5605-5606, reprinted in 1984 U.S.C.C.A.N